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Nos. 716, 695 and 954

In the Supreme Court of the United States

October Term, 1961

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v.

UNITED STATES OF AMERICA

DAVID DORAN, PETITIONER

v.

UNITED STATES OF AMERICA

PETER GEMMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 716

DOMINICK ABBRESCIA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 895

DAVID DORAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 956

JULIUS GRIECO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 716, pp. 25–32; Pet. No. 895, App. A; Pet. No. 956, App. A) is reported at 299 F. 2d 511.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1961. The petition for a writ of certiorari by Abbrescia was filed on February 10, 1962. Separate petitions for rehearing by Doran and Grieco were denied on March 7, 1962, and March 26, 1962, respectively. On April 3, 1962, Mr. Justice Clark extended Doran's time for filing a petition for a writ of certiorari to and including April 23, 1962, and the petition was filed on April 20, 1962. On April 18, 1962, Mr. Justice Clark extended Grieco's time for filing a petition for a writ of certiorari to and including May 10, 1962, and the petition was filed on May 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying a motion for a mistrial following the admission into evidence of certain checks held by a state court to have been seized following an illegal entry (Nos. 716 and 895).[1]

2. Whether the court's rulings on the admissibility of evidence were proper (No. 956).

3. Whether the procedure employed in numbering the exhibits denied petitioners a fair trial.

4. Whether it was error to send to the jury both sides of an exhibit (a fingerprint card) after only one side was admitted into evidence, where the court offered counsel ample opportunity to inspect all ex-

[1] Where a point is raised by only one or two of the petitioners, we designate the number of the petition raising the issue.

hibits prior to their transmittal to the jury (Nos. 716, 956).

5. Whether the instructions to the jury were proper.

6. Whether defendants were prejudiced by the fact that the courts below adverted to the mail fraud scheme as a "conspiracy" (Nos. 895, 956).

7. Whether the government misled the court in its brief in the court of appeals (No. 956).

8. Whether the court of appeals failed to pass upon all contested issues which petitioners urged below.

STATEMENT

Petitioners and five other individuals[1] were indicted in the Northern District of Illinois for various offenses resulting from a scheme to defraud (P.A. 11-39).[2] Counts 1 through 6 charged all the defendants with causing envelopes containing checks to be mailed to certain banks in furtherance of this scheme to defraud, in violation of 18 U.S.C. 1341 (P.A. 11-21). Counts 7 through 23 and 38 through 40 each charged Doran and

[1] Four of the other defendants were convicted (P.A. 173). The case of the fifth defendant, James T. Korbos, was dismissed before trial (P.A. 43). Two of those convicted, Harris and Schulman, did not appeal. Di Domenico died pending appeal. The conviction of Lo Celso was also affirmed by the court below.

[2] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals, the typewritten transcript of the evidence and four volumes of exhibits. Petitioners' joint appendix is designated herein as "P.A." and the government appendix as "G.A.". The typewritten transcript is designated as "Tr.". The four exhibit volumes are designated as "E" with appropriate volume and page number. Also on file are the briefs filed in the court of appeals, the transcript of the opening statements of counsel and the sentencing of petitioners. This part of the transcript is separately paginated.

one or two of the other defendants (Abbrescia in nine and Grieco in four of these counts) with the transportation in interstate commerce of falsely altered checks in violation of 18 U.S.C. 2314 (P.A. 22–30, 38–39).[4] Counts 24 through 37 charged Doran and one or two of the other defendants (Abbrescia in one of these counts) with the transportation in interstate commerce of falsely made and forged checks, in violation of 18 U.S.C. 2314 (P.A. 31–38).[5]

Petitioners were convicted by the jury on all counts submitted to the jury (P.A. 173). Abbrescia was sentenced to a total of ten years' imprisonment—five years on the mail fraud counts to run consecutively to a term of five years imposed on the interstate transportation counts (P.A. 175). Doran was sentenced to a total of twenty-five years' imprisonment—three consecutive sentences of five years on three mail fraud counts to run consecutively to a ten-year sentence imposed on the transportation counts (P.A. 173–174). Grieco was sentenced to a total of fifteen years' imprisonment—a sentence of five years on the mail fraud counts to run consecutively to a sentence of ten years on the transportation counts (P.A. 174).[6]

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[4] Abbrescia was so charged in counts 7 through 10, 18 through 20, 39 and 40; Grieco in counts 23 and 38 through 40; defendant Harris, the other defendant named in these counts, was charged in counts 7 through 23.

[5] Abbrescia was so charged in count 33; defendant Schulman was charged in counts 24 through 29, 32 and 34 through 37; and defendant Harris was named in counts 30, 31 and 33.

[6] All petitioners were convicted under mail fraud counts 1, 2 and 6; Abbrescia was also convicted under eight other counts (counts 9, 10, 18, 19, 20, 35, 39 and 40); Doran was also con-

The sufficiency of the evidence is not challenged here. In brief, it showed that between September 21, 1956, and October 15, 1957, petitioners engaged in an organized scheme to obtain money from customers, generally intoxicated, at a Chicago tavern, the Show Lounge, by inducing them to write checks which were used as models for forged copies or were altered in amount. Other checks were fraudulently obtained by misrepresentation. During the course of the trial 32 victims testified.

The mode of operation was as follows: A Chicago cab driver would drive a passenger seeking night life entertainment to the Show Lounge (P.A. 59, 64, 81, 133), where an "exotic" dancer employed by the tavern would join the patron and induce him to drink intoxicants. Frequently the visitor would be served "spiked" drinks. When the victim was sufficiently intoxicated, the dancer would remove the cash from his wallet (P.A. 93, 111, 118, 123; G.A. 36, 40–42). When the victim later found that he had no money with which to pay for his drinks, he would be induced to write a check payable to cash (P.A. 64–65). In some instances, he would then be deceived into believing this check had been destroyed (P.A. 65, 81, 84–85, 133–134; G.A. 37). Some of these checks were used as models to trace forged copies (*e.g.*, G.A. 38, 42). Other checks were altered in amounts (*e.g.*, P.A. 86, 65). These checks were then placed into normal business channels by commercial enterprises that nor-

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victed under twenty-six other counts (counts 8 through 17, 21, 22, 24, 26, 27, 28, 30, 31, 32 and 34 through 40); Grieco also was convicted under counts 38, 39 and 40.

mally cashed checks for numerous customers, and they were then transferred through regular banking channels (P.A. 49, 58, 85, 110, 143).

The evidence showed that the checks involved in the mail fraud counts were mailed to the drawee banks (P.A. 124–125, 127–129). It also disclosed that the checks involved in the other counts, drawn on out-of-state banks, were transported in interstate commerce after being forged or altered. (*e.g.*, P.A. 58–59, 78–79, 85).

Petitioner Abbrescia was the manager of the Show Lounge and petitioner Doran was his assistant (P.A. 120). They directly manipulated or supervised the scheme whereby the victims were defrauded (P.A. 70, 113, 123). Petitioner Grieco's personal bank account and his business account, the 24-hour Shopping Center, were employed as the means of depositing 22 fraudulent checks dated between September 21, 1956, and December 10, 1956, drawn on out-of-town banks.[1] Other bank accounts used for placing the checks into normal channels included the Ogden-Kedzie Currency Exchange operated by defendant Schulman, which channelled most of the forged checks; the Lawndale

[1] Exhibits 1, 201, 401, 601 (Wyman); 2-A, 202-A, 402-A (H. L. Smith), 23 (Bardin); 224 (Brockel); 225, 425, 625, 825, 1025 (Couch); 38, 338, 438 (Graham), 39, 239, 40 (Bynum); 273, 473 (Boalt). See 1 E 1, 4, 23, 24, 26–27; 2 E 48; 3 E 76. Sixteen of the checks passed through the Shopping Center account and six through Grieco's personal account. The first of these instruments is an altered check dated September 21, 1956 (Exhibit 23; 1 E 23). The balance of the checks are dated between November 12, 1956, and December 10, 1956. There were six other altered checks (Exhibits 2-A, 38, 39, 40, 202-A 402-A; 1 E 4, 2 E 47, 48).

Restaurant operated by defendant Harris; and the Elston-Damen Currency Exchange (P.A. 92, 97). Petitioner Grieco was also identified as the reputed owner of the Show Lounge (P.A. 93, 96).

ARGUMENT

1. Petitioners Abbrescia (No. 716) and Doran (No. 895) contend that five checks seized in a brothel following an arrest by state police officers should have been suppressed as evidence. These checks, which were offered on the mail fraud counts only as corroborative evidence to show the scheme, consisted of two altered checks signed by one victim (Marvin) on April 25, 1957, and three checks, represented to have been voided, signed by another victim (Ramsey) on May 1, 1957 (P.A. 103–104, 115). Chicago Police Officer Tracy, investigating vice operations, testified that on May 11, 1957, at 11:00 p.m., he and another police officer were admitted by a man to a five-room flat. At a bar in its living room they purchased a drink and conversed with two girls. The officers went to a bedroom with the girls, paid them $25 and then arrested them, the bartender and Doran. The flat was searched and the checks, found in a bedroom, were seized (Tr. 1372–1375). Following Tracy's direct examination, the defense moved for a mistrial on the ground that this testimony connected Doran with crimes not charged in the indictment (Tr. 1377). On cross-examination, Tracy stated that the court had discharged all those arrested following the sustaining of a motion to suppress on the ground, he believed, that there had been an illegal entry (Tr. 1386–1387). The defendants then

renewed their motion for a mistrial, stating they wished to "call to the court's attention now that there has been a judicial ruling in connection with these arrests and these circumstances, which held that evidently there was an illegal entry here." The prosecutor replied that this motion did not apply to the evidence because "[i]f there was illegal search, your Honor, it does not affect the evidence which is presented here, which is presented on behalf of the Federal government." The court then denied the motion without comment (P.A. 100).*

Petitioners argue that, since under the ruling of *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, evidence illegally seized by a state officer is inadmissible in a federal court, the court erred in admitting the checks into evidence. But petitioners made no showing that the checks were illegally seized; they relied entirely upon the state court's ruling suppressing the evidence on the ground that the entry by the officers was illegal. This Court in *Elkins* specifically held that the federal court is not bound by a state court's conclusions as to the legality of a search, stating (364 U.S. at 224): "The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." On the facts in the record, which petitioner did not con-

*The motion for a mistrial was renewed during the testimony of the named maker of one group of these checks (P.A. 103–104).

test by any offer of proof,[9] there was no showing of illegal entry or illegal search. The police officers did not invade the privacy of any person in entering the brothel; rather, they were freely admitted with the consent of the occupants. The fact that they acted like customers and did not reveal their identity as police officers until they had seen an offense does not render the entry illegal. *Bush* v. *United States*, 283 F. 2d 51 (C.A. 6), certiorari denied, 364 U.S. 942. See *On Lee* v. *United States*, 343 U.S. 747.

In any event, this evidence merely corroborated the testimony of the two victims themselves and was merely cumulative evidence of the scheme to defraud. Neither Marvin nor Ramsey was a signer of checks on which any count of the indictment was based. Hence, if there was error, it was harmless.

2. Petitioner Grieco (No. 956) attacks various rulings on the admissibility of evidence.

(a). He argues that in the absence of a conspiracy charge the court could not admit evidence against him upon the theory that he conspired with others in a scheme to defraud (Pet. 3, 17). It is well settled, however, that when several persons act together to commit a substantive offense, the rules of evidence are the same as when a conspiracy is charged, and specifically that a scheme to defraud, shared by several persons, is in its legal nature a conspiracy. *Robinson*

[9] Petitioners also failed to explain why they did not seek to suppress the checks as evidence in a pre-trial motion. See Rule 41(e), F.R. Crim. P.

v. *United States*, 33 F. 2d 238, 240 (C.A. 9); *Blue* v. *United States*, 138 F. 2d 351, 358 (C.A. 6), certiorari denied, 322 U.S. 736; *Baker* v. *United States*, 115 F. 2d 533, 540 (C.A. 8), certiorari denied, 312 U.S. 692. See also *United States* v. *Olweiss*, 138 F. 2d 798, 799–800 (C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9). Here, the trial judge in making his preliminary ruling on the admissibility of evidence ruled that such joint action had in fact been established (P.A. 157). Petitioner Grieco also argues that statements of his co-defendants Harris, Lo Celso and Schulman (P.A. 134–135, 138–139) subsequent to the termination of the conspiracy were admitted into evidence "against him" (Pet. 16–17). Since, however, none of these statements implicated Grieco, their admission would at most be harmless error as to him.

(b). Grieco also objects (Pet. 32–34) to the admission into evidence of a conversation that he had with an F.B.I. agent on November 8, 1956, in which the agent questioned Grieco concerning his knowledge of a forged check, payable to cash and cashed by Grieco, which had been drawn on a particular out-of-town bank (P.A. 130–133). It is true that this check was not tied to the scheme. However, the transaction occurred shortly before the period of time, November 12, 1956, to December 10, 1956, covered by the bulk of the checks that were negotiated through Grieco's bank accounts. This evidence was admissible for such bearing as it might have on guilty knowledge—*i.e.*, whether Grieco had handled the other checks innocently or as a "fence" for false checks.

(c). As to four checks, Exhibits 23 (Bardin), 39 and 40 (Bynum) and 1 (Wyman), petitioner Grieco

claims (Pet. 30–32) that these were introduced in violation of the best evidence rule because photographic copies of microfilm were introduced without the original microfilm. The exhibits were, however, identified by the F.B.I. agent who made these photographs from microfilms he had personally examined at the Merchants National Bank, where Grieco had his account. The fact that the original was not in court does not show that it was not available if desired within the meaning of 28 U.S.C. 1732(b).[10] The vague objection, "no sufficient foundation," in the context in which it was made, was not adequate to show that petitioner was requesting an opportunity to inspect the microfilm as a prerequisite to the introduction of these photographs in evidence.

3 (a). Petitioners (Abbrescia, No. 716, Pet. 15–19; Doran, No. 895, Pet. 14–18; and Grieco, No. 956, Pet. 20–21) all object to the fact that while the case was pending upon appeal, the district court, after a hearing, entered an order which in effect noted certain errors in connection with three exhibits (P.A. 182–183). After the court had indicated outside of the presence of the jury that Exhibit 167, together with other "Dupl Check" exhibits would be admitted into evidence (P.A. 148), the record shows that the tender in the presence of the jury related to "Exhibit 176" (P.A. 160). It was obvious that the reference was to Exhibit 167. The other errors involved the duplicate numbering of two sets of docu-

[10] As to Ex. 1, the full transcript indicates that the agent testified it was a copy made from one of two indicated rolls available in court (Tr. 97–98); the agent did not state that it was made from unidentified microfilm not in court.

ments as Exhibits 133 and 133(a) relating to two victims (2 E 38–40).[11] Since the jury would have identified each victim with his name on the exhibit, no prejudice could have resulted. The two notes attached to the duplicate exhibits by the prosecution simply explained the mix-up and are completely innocuous (2 E 38, 40). In no instance was the record physically changed in any respect.

(b). Petitioners Abbrescia and Doran also complain of minor mistakes in the numbering of the exhibits during the course of the trial, such as the fact that the record shows that Exhibit 61 was referred to as both a signature card and a check (P.A. 46, 66). The frivolous nature of this contention is apparent from the lack of objection on the part of petitioners' trial counsel.

4. Petitioners Abbrescia (No. 716, Pet. 11–15) and Grieco (No. 956, Pet. 16) argue that they were prejudiced because Exhibit 961(b), which was not offered into evidence, was sent to the jury (2 E 53).[12] This exhibit was the back of a fingerprint card, Exhibit 961(a), which had been admitted into evidence to prove that petitioner Abbrescia's fingerprints were upon some of the checks involved in the scheme (P.A. 66–69).

The short answer to petitioners' argument is that they were given ample opportunity to examine all exhibits prior to the time they were given to the

[11] Since Doran (the only petitioner convicted under count 36) received a concurrent sentence on count 36, the typographical error in the indictment concerning the date of this check is immaterial.

[12] The record does not reflect that this matter was ever brought to the attention of the trial judge.

jury. The record reveals that the following ensued after the jury had retired for their deliberations (Tr. 2774):

> Mr. KELLER (The prosecutor): I have these exhibits arranged in such a way that counsel can check through them before turning them over to the jury.
>
> The COURT. I was going to suggest that you go over them together and check them, and if there are any questions on that I will be in chambers * * *.

Furthermore, the information on this exhibit did not prejudice petitioners' case. Since the record shows that the F.B.I. was investigating this case in June and July 1959 (P.A. 134–135), the arrest date of June 10, 1959, and the description of the offense as "I T S P & mail fraud" would have been certainly understood by the jury to have reference to the instant charge. It would be unwarranted speculation to conclude, as petitioners contend, that the jury, if it saw the back of the card, was likely to think that Abbrescia was to be placed on probation simply because the exhibit showed that the probation office was to be sent a copy of the fingerprint card.

5. The various attacks on the instructions are without substance.

(a). On the counts charging interstate transportation of false checks, the court omitted the word "altered" in its summary of the indictment (P.A. 167) and its reading of the statute (P.A. 172). Upon the suggestion of the prosecution, the summary of the indictment was amended in four places to include the

word "altered" (Tr. 2766–2769, 2772). Grieco's trial counsel agreed to two of these changes, was silent to a third and objected to the fourth as follows: "I think 'falsely made' includes 'altered'" (Tr. 2769). By consent of all parties, the jury was given a copy of this summary to be taken to the jury room (Tr. 2722–2723, 2765). Under these circumstances, Grieco's present complaint (No. 956, Pet. 35–36) that he was prejudiced by the omission of the word "altered" in connection with the reading of the statute is without merit. Since the omission of "altered" from other parts of the instruction was called to the attention of defense counsel, it was their clear duty to complain at that time if they desired the court to include "altered" in its reading of the statute. The judge did make it clear that to convict, the jury had to find that each petitioner knew the checks were falsely made, forged or altered.

(b). The court was not required, as argued by petitione Abbrescia (No. 716, Pet. 19–24) and Doran (No. 895, Pet. 18–23), to define the terms "forgery," "altered security" or "falsely made security." There was no doubt as to what acts were performed or the meaning of the terms in relation to the evidence in the case. In the absence of any request to charge, the court had no duty to amplify these instructions. Cf. *Guon* v. *United States*, 285 F. 2d 140, 142 (C.A. 8). The jury could not base a conviction for transportation on a fraudulently obtained check, for no such check was described in any of the counts charging a violation of 18 U.S.C. 2314.

(c). Petitioner Grieco asserts (No. 956, Pet. 16–17) that the trial court permitted the jury to consider without limitation statements of co-defendants made out of his presence. The jury was adequately charged on this issue in the following instruction, to which no objection was taken (P.A. 171):

> * * * The declarations, statements and conversations of one defendant, made out of the presence of the other defendants, [are] not binding upon the other defendants, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the scheme to defraud charged in Counts 1, 2 and 6 of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, statements and conversations were in furtherance of the scheme to defraud and made during its continuance.

6. Petitioners Doran (No. 895, Pet. 8–10) and Grieco (No. 956, Pet. 12–19) argue that they were prejudiced by statements in the opinion of the court of appeals and at the trial that the mail fraud counts were conspiratorial rather than substantive offenses. The trial judge, in admitting evidence on the mail fraud counts, treated the scheme as a conspiracy (P.A. 65, 81, 83, 95, 97, 99, 104, 145, 160–161). His references to conspiracy were for the purpose of invoking the rule of evidence applicable if a conspiracy in fact did exist.[13] Trial counsel so understood his

[13] See pp. 9–10, *supra*.

remarks (Tr. 1109, 2207–2208, 2245).[14] And there is no contention here that the trial court's instructions were inadequate to sustain substantive mail fraud convictions. On the contrary, petitioner Grieco contends that "[n]o charge was given to the jury upon which it could have predicated a conspiracy verdict" (Pet. 12).

It is true that the court of appeals did say that the evidence was sufficient to sustain the verdicts "on conspiracy Counts One, Two, Six" and that the defendants were convicted of "conspiracy to use the mails in a scheme to defraud" (Abbreseia, Pet. App. 32, 25). But since a conspiracy in fact existed (see pp. 9–10, *supra*), this error in the court's opinion could not have resulted in any prejudice to petitioners.

7. Petitioner Grieco claims (No. 956, Pet. 19–30) that the prosecution "falsified the content of the record" and "tampered with the record on appeal". Aside from the issue of the numbering of the exhibits, discussed *supra*, pp. 11–12, the objections stem primarily from petitioner's refusal to recognize that the prosecution may draw reasonable inferences from the evidence. The brief filed by the government below sets forth the evidence upon which it urged the court to conclude that Grieco owned the Show Lounge (Government's Brief in Answer to Appellant Grieco, pp. 31–35). It was also

[14] For example, after the conclusion of the presentation of evidence, trial counsel for petitioners stated: "that there has been no showing here substantially of any scheme or artifice to defraud which would encompass the rules of conspiracy evidence, the rule under which evidence may be admitted under the conspiracy theory" (Tr. 2245).

proper to argue that the evidence offered justified the inference that the first endorsers on the backs of the checks were fictitious (*id.* at pp. 4, 17–24). The circumstantial evidence indicating that some of these out-of-town checks, payable to cash and written at the Show Lounge, purported to pass through different persons before passing through Grieco's bank account justified the conclusion that the first endorsement was fictitious. There was similarly no misrepresentation as to the Bardin check. Although the government did argue that the handwriting was similar to Doran's writing, it conceded that the handwriting expert had not so testified (*id.* at pp. 18–19). The check itself (Exhibit 23) has on its back an endorsement from the Shopping Center to the order of Merchants National Bank. While the bank endorsements on the check are indistinct, the jury was justified in accepting the testimony of the F.B.I. agent that he made a photograph of the check from microfilm at the bank. On the face of the check is a memorandum which states that payment had been refused because the amount was altered (1 E 23).

8. Petitioners complain that the court of appeals, in reviewing the case, ignored some of the points raised by petitioners below. The court in its conclusion said it had "discussed the points that need consideration. No prejudicial error is shown" (Abbrescia, Pet. App. 32). The statement implicitly rejected the points not specifically mentioned. A litigant cannot require that an appellate court set forth its reasons for rejecting

a particular argument, since the extent to which it explains its conclusions is within the reasonable discretion of the court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

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